Supreme Court, U.S.
F I L E
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No. 94-1339

In The

Supreme Court of the United States

October Term, 1994

KERRY L. MALTBY,

Petitioner,

v.

MARTY WINSTON, WEST CENTRAL ILLINOIS TASK FORCE, and DEWAYNE BOND, Sheriff of Schuyler County,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY AND SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. THE APPELLATE COURT DID NOT APPLY THE PROPER STANDARD OF REVIEW TO THE DENIAL OF WINSTON'S J.N.O.V. MOTION 1

II. THE STANDARD OF REVIEW WAS OUTCOME DETERMINATIVE 3

III. THE RECORD IN THIS CASE PROPERLY PRESENTS THIS COURT WITH THE OPPORTUNITY TO RESOLVE THE SPLIT IN THE CIRCUITS AS TO THE PROPER STANDARD OF REVIEW OF THE QUALIFIED IMMUNITY ISSUE AND THE ROLE OF THE JURY 5

IV. A PETITION GRANTED BY THIS COURT MAY SHED LIGHT ON THE ISSUES RAISED IN THIS PETITION 8

V. THE LAW WAS CLEARLY ESTABLISHED IN RELATIONSHIP TO WINSTON'S ACTIONS AND HIS ACTIONS VIOLATED THAT LAW 9

VI. CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Elder v. Holloway, ___ U.S. ___, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994) 7, 9, 10

Henderson v. DeRobertis, 940 F.2d 1055 (7th Cir. 1991) 2

Johnson v. Jones, 26 F.3d 727 (7th Cir. 1994), cert. granted, ___ U.S. ___, 115 S.Ct. 305, 130 L.Ed.2d 621 (1995) 8

Presley v. City of Benbrook, 4 F.3d 405 (5th Cir. 1993) 8

Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) 4, 5

Sanchez v. Sanchez, 777 F. Supp. 906 (D.N.M. 1991) 8

Sloman v. Tadlock, 21 F.3d 1462 (9th Cir. 1994) 8

I. THE APPELLATE COURT DID NOT APPLY THE PROPER STANDARD OF REVIEW TO THE DENIAL OF WINSTON'S J.N.O.V. MOTION.

Winston attempts to justify the Appellate Court's decision to apply a de novo standard of review by arguing it was proper as part of the Appellate Court's review of the denial of Winston's J.N.O.V. Motion after the jury trial. This attempt is improper for two reasons.

First, this argument is not supported by the opinion. The Appellate Court never stated its de novo standard of review was based upon its review of Winston's J.N.O.V. Motion. In fact, the Appellate Court never identified the aspect of the trial court proceeding in which it believed reversible error occurred. It is obvious based on the jury's award of $2,300 of punitive damages to Maltby, which the trial court did not disturb, that the jury viewed Winston's conduct as egregious. However, the Appellate Court did not make any reference to the import of the jury's punitive damage award in its analysis. The Appellate Court simply proclaimed its belief as to the actions of a "reasonable police officer" and that Winston's actions were at most "a mistake in judgment" and reversed the jury's verdicts without any explanation as to why the jury and trial judge's contrary view was wrong (App. 14-16). Although not explicitly stated by the Appellate Court, the lack of reference or deference to the trial court findings is indicative of a de novo standard of review of the issue of qualified immunity as a pure legal issue.

Second, assuming arguendo, that the Appellate Court meant to review the trial judge's denial of Winston's

J.N.O.V. Motion, it failed to apply the proper J.N.O.V. de novo standard of review which, as noted by Winston, requires *all* evidence to be viewed in the light most favorable to the prevailing party. *Henderson v. DeRobertis*, 940 F.2d 1055, 1057 (7th Cir. 1991). The Appellate Court attempted to explain away evidence that favored Maltby (App. 15-17) and paid no deference to the jury's verdicts whatsoever. Furthermore, the Appellate Court's determination as to a "mere mistake in judgment" is at odds with the record. Winston did not acknowledge any mistake at trial and still claimed he was right about his identification of Maltby (Pet. 9). In addition, the Appellate Court did not make any reference to the evidence which showed that:

> 1) a reasonable police officer in Winston's position should have checked his belief regarding Maltby's identification with Winston's fellow officer, Sage, as part of Winston's investigation of the case (Pet. 9-10);
>
> 2) Winston ultimately decided to check Maltby's identity with Sage after Maltby had been in jail for 60 days because Maltby wasn't "pleading out" (Pet. 4);
>
> 3) Winston's actions were a flagrant violation of police procedure in the opinion of Maltby's expert witness (Pet. 10);
>
> 4) Winston was told by his supervisor to follow up on the variance between the registration of the car used in the Dairy Queen transaction and the name "Kerry Maltby" before Maltby's arrest but, Winston did not do so (Pet. 7-8);

5) an intelligence file indicated the owner of the car used in the Dairy Queen transaction was engaged in drug sales and the statements made by the suspect in the Dairy Queen transaction about growing marijuana were consistent with that information (Pet. 7);

6) the informant had been implicated in drug purchases and agreed to serve as an informant in the hope of lessening his punishment (Pet. 7);

7) the informant's failure to maintain contact with Winston prior to Maltby's arrest was a violation of the informant's duty as an informant (Pet. 3); and

8) criminal charges were filed against the informant prior to Maltby's arrest (Pet. 3).

Based on these glaring omissions, Winston cannot seriously argue that the Appellate Court applied the traditional de novo standard of review to the denial of his J.N.O.V. Motion. It is clear based upon a review of the opinion that the Appellate Court utilized a do novo standard of review of the qualified immunity issue as a pure legal question without considering the evidence it chose to discuss in the light most favorable to the prevailing party and omitted altogether important facts that favored the prevailing party at trial, Maltby.

II. THE STANDARD OF REVIEW WAS OUTCOME DETERMINATIVE.

Winston claims review by this Court is not warranted because the Appellate Court stated the standard of review was not outcome determinative (App. 12).

Although admittedly, that is what the Appellate Court said, the form of its opinion belies that assertion. The Appellate Court included a lengthy analysis that encompassed parts of three pages of its opinion in Footnote 7 in defense of its de novo standard of review even though it was not "outcome determinative" (App. 12-4). In that footnote, the Appellate Court attempted to cloak its decision in the authority of this Court by citing *Malley v. Briggs* and *Hunter v. Bryant* and purported to speak for this Court even though the standard of review was not "outcome determinative".

Furthermore, this Court has recognized that an appellate court's statement about the basis for a decision does not conclusively establish it as the actual basis for the decision or prohibit Supreme Court review of the appellate court's analysis. In the case of *Pullman-Standard v Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), the appellate court reviewed the facts of the case anew and rejected the district court's findings. Late in the appellate court's opinion, it made reference to the clearly erroneous standard of review of factual issues required by Federal Rule of Civil Procedure 52(a) as the controlling standard of review. Upon review in this Court, the plaintiffs attempted to defend the appellate court's decision based on its reference to the clearly erroneous standard of review, which is the standard of review this Court ultimately adopted as the proper standard of review in that case. This Court rejected plaintiff's argument and held that the opinion "strongly suggest[ed] that the outcome was the product of the court's independent consideration of the totality of the circumstances it found in the

record." *Pullman-Standard v. Swint*, 456 U.S. 273, 290-1, 102 S. Ct. 1781, 1791, 72 L.Ed. 66, 81 (1982).

Maltby submits that this Court should draw the same conclusion about the Appellate Court's opinion in this case. The entirety of the opinion indicates it was based on the Appellate Court's wholesale reweighing of the evidence. Notwithstanding the Appellate Court's protestation to the contrary, the de novo standard of review was in actuality outcome determinative because the standard of review selected by the Appellate Court is the only standard of review that enabled it to avoid viewing the evidence in the light most favorable to the prevailing party, Maltby.

III. THE RECORD IN THIS CASE PROPERLY PRESENTS THIS COURT WITH THE OPPORTUNITY TO RESOLVE THE SPLIT IN THE CIRCUITS AS TO THE PROPER STANDARD OF REVIEW OF THE QUALIFIED IMMUNITY ISSUE AND THE ROLE OF THE JURY.

Winston does not deny a split in the circuits on the issues of whether qualified immunity is an issue of law or fact and the proper standard of review. Nor does he deny that this Court has not resolved these issues. Instead, Winston claims this is not the proper case to decide the issues based on the record and the Appellate Court's lack of analysis of the role of the jury. Maltby submits this assertion is wrong for several reasons.

First, there is no dispute that the jury received an instruction on the issue of qualified immunity. (T at 693-4,

Court's Inst. No. 1 R. Doc. 224). Therefore, the jury's role in deciding the issue is unquestionably of record.

Second, the Appellate Court said it was not addressing the jury instruction on the issue of qualified immunity (App. 18 n.12). However, in reality, the Appellate Court implicitly addressed the issue and determined the jury could not decide the issue of qualified immunity by adopting and applying a de novo standard of review as a pure question of law and reversing the jury's verdicts. It would be logically inconsistent for the Appellate Court to apply a de novo standard of review without any deference to the facts that favored the prevailing party at trial *and* hold at the same time it was proper for the jury to decide the issue of qualified immunity. The realm of issues to which a de novo review as a pure question of law actually applies and issues that are the proper subject of determination by a jury are mutually exclusive.

Third, the briefs adequately developed the standard of review issue and the role of the jury in deciding the issue of qualified immunity. Federal Rule of Appellate Procedure 28(a)(6) and (b)(4) requires the parties to identify the standard of review in their briefs. The parties complied with that rule. Winston devoted two pages of his Appellant Brief (Pg. 24-5) and fourteen pages of his Reply Brief (Pg. 5-18) to the standard of review issue. Maltby devoted three pages of his Appellee Brief (Pg. 33-5) to the issue. Winston argued in three pages of his Appellant Brief (Pg. 40-2) and three pages of his Reply Brief (Pg. 38-40) that qualified immunity is a question of law and the jury should not have been instructed on the issue. Maltby argued in six pages of his Appellee Brief

(Pg. 45-50) that the jury could decide the issue of qualified immunity and received proper instructions.

Admittedly, the cases cited by Maltby on these issues on appeal were by and large Seventh Circuit cases. However, as Footnote 7 of the Appellate Court's opinion demonstrates, cases from the Seventh Circuit reflected a split on these issues and the issues are still unresolved for that matter, since the Seventh Circuit has not reviewed the issues *en banc*. Winston does not claim the Seventh Circuit cases cited by Maltby are not representative of the split on the issues in cases from other circuits, which were cited by Maltby in his Petition for a Writ of Certiorari. Nothing would have been added to the record or the Appellate Court's analysis by having Maltby cite cases from other circuits in his brief or petition for rehearing. In addition, Winston's argument in essence considers the citation of individual cases to be "the equivalent of legal facts." This Court has rejected Winston's "legal facts" argument. *Elder v. Holloway*, ___ U.S. ___, 114 S.Ct. 1019, 1022-3, 127 L.Ed.2d 344, 350-1 (1994). Therefore, the standard of review for qualified immunity, the role of the jury, and the jury instructions issues were fully developed by the parties at the trial and appellate levels and provide this Court with a meaningful opportunity to address and resolve the issues.

Furthermore, Winston overlooks the fact that only this Court, not the Seventh Circuit, can conclusively resolve the conflict on the issues and establish the appropriate standard of review and the role of the jury nationwide for all litigants. Many courts have noted the confusing state of the law on the roles of the trial judge and the jury on the issue of qualified immunity. (See

Sanchez v. Sanchez, 777 F. Supp. 906, 914 (D.N.M. 1991); *Presley v. City of Benbrook*, 4 F.3d 405, 409 (5th Cir. 1993); and *Sloman v. Tadlock*, 21 F.3d 1462, 1466-9 (9th Cir. 1994) which was cited by Winston in his brief. (Brief 13)) The time has come to clear up this area of law. Civil rights litigants have faced the uncertainty of how the trial courts should apply the clearly established law component of the qualified immunity issue to the facts of cases and the appropriate standard of review of trial court decisions on the issue of qualified immunity long enough. This Court should resolve these issues by accepting this case for review. Otherwise, the parties, trial judges, and appellate courts will continue to drift about aimlessly like a ship without a rudder in addressing these issues and will continue to reach conflicting conclusions.

IV. A PETITION GRANTED BY THIS COURT MAY SHED LIGHT ON THE ISSUES RAISED IN THIS PETITION.

Earlier this year, this Court granted certiorari in the case of *Johnson v. Jones*, 26 F.3d 727 (7th Cir. 1994), cert. granted, ___ U.S. ___, 115 S.Ct. 305, 130 L.Ed.2d 621 (1995). The question presented in that case is:

> "In action under 42 U.S.C. 1983, may denial of public official's motion seeking summary judgment on qualified immunity grounds because plaintiff failed to adduce any evidence showing wrongful conduct be challenged in interlocutory appeal?"

Although an interlocutory appeal is not involved in this petition, the Court's disposition of the *Johnson v. Jones*

case could illuminate the interplay between the clearly established law component of qualified immunity analyzed in *Elder v. Holloway, id.*, and the application of the clearly established law to the facts. To the extent that the Court actually addresses the role of the facts in the issue of qualified immunity in that case, it should be considered by the Court in addressing this petition, too.

V. THE LAW WAS CLEARLY ESTABLISHED IN RELATIONSHIP TO WINSTON'S ACTIONS AND HIS ACTIONS VIOLATED THAT LAW.

Maltby's Petition included twelve pages of analysis of the issue of the clearly established law (Pet. 18-29). Winston responded with four pages on criticism of Malt by's cases (Brief 16-19). However, Winston did not offer any cases which involved the issue of probable cause and actions and omissions similar to Winston's in support of his view of the state of the clearly established law. Instead, Winston simply repeated the Appellate Court's statement that a reasonable police officer in Winston's position could have concluded that Maltby committed the crime "looking to our case law on probable cause generally" (Brief 16 and App. 18). Other than this case, where is the case law on "probable cause generally" which supports the contention that probable cause for an arrest existed in a situation in which the police received information prior to the arrest that the informant was acting in an improper fashion, the informant disappeared after being challenged with that information and remained at large at the time the arrest was made, and the officer who got a brief glimpse of the suspect at the scene applied for a warrant roughly 8 weeks after the incident without

checking his identification of the suspect with the officer who had face-to-face contact with the suspect during the transaction prior to the suspect's arrest, and failed to do so until 60 days following the suspect's arrest? The obvious answer is such "general probable cause case law" does not exist! Maltby submits Winston's failure to cite actual cases which show that Winston's actions were proper, demonstrates that the cases cited by Maltby properly represent the clearly established law and that the Appellate Court's statement to the contrary is wrong. This Court should grant this Petition, if for no other reason than to maintain a uniform body of clearly established law on the issues raised by Winston's actions and omissions, as set forth by Maltby and "deter public officials' unlawful actions and compensat[e] victims of such conduct." *Elder v. Holloway*, ___ U.S. ___, 114 S.Ct. 1019, 1023 and n.3; 127 L.Ed. 2d 344, 350 and n.3 (1994).

VI. CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition for writ of certiorari the writ should be granted.

Respectfully submitted,

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